IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 11 OF 1997.

Smt. Carlota Fernandes,
major, married,
wife of late Francisco Fernandes,
resident of Nachinola, Bardez,
Goa. ... Apppellant.

VERSUS

1. Mr. Mukund Shamba Naik,
   son of Shamba Naik,
   65 years, Driver.

2. Mrs. Laxmi M. Naik,
   major, housewife,

3. Mr. Datta Shamba Naik,
   (Since deceased, through Legal
   heirs):-

   3a) Miss Pratima D. Naik.

   3b) Mr. Pradeep D. Naik.

   3c) Miss Prashila D. Naik,
       All residing at Quitula,
       Aldona, Bardez, Goa.

4. Mrs. Sulochana Datta Naik,
   major, housewife.

5. Mr. Pandurang Shamba Naik,
   son of Shamba Naik,
   45 years, Driver.

6. Mrs. Poonam P. Naik,
   major, housewife.

7. Mr. Mahadev S. Naik,
   major, housewife,

8. Mrs. Madhavi M. Naik,
   major, housewife.
   All residents of Quitula,
   Aldona, Bardez, Goa.

9. Mr. Pramod Atmaram Fatarpekar,
   about 46 years, son of Atmaram
   Fatarpekar.

10. Mrs. Pramod Atmaram Fatarpekar,
major, housewife.
Both residents of House No.
144, Betim, Bardez, Goa.

11. Mr. Sriram Shamba Naik,
major, 54 years, driver.

12. Mrs. Sitadevi S. Naik,
major, housewife.
All residents of Quitula,
Aldona, Bardez, Goa. ... Respondents.

Mr. Sudin Usgaonkar, Advocate for the Appellant.

Mr. J.P. Mulgaonkar, Advocate for the Respondents No.1, 2, 4, 5, 6, 7, 8, 9 and 10.

CORAM: N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 16.03.2004
DATE OF PRONOUNCING THE JUDGMENT: 23.03.2004

J U D G M E N T:

This appeal is filed by the defendant No.1 in Special Civil Suit No.156/1991/A against the Judgment dated 30.09.1996 of the learned Civil Judge Senior Division, Mapusa by which the said learned Civil Judge Senior Division dismissed the counter claim filed by the defendant No.1 and decreed the Suit filed by the Plaintiffs.

2. Some facts are required to be stated to dispose of the present Appeal and for that purpose the parties hereto shall be referred to by their

names as they appear in the cause title of the said Civil Suit.

3. The plaintiffs No.1, 3, 5 and 7 along with the defendant No.2 in the said Civil Suit were brothers who purchased a property known as "Gharbhat" bearing Survey No.110/2 by Sale Deed dated 8.11.1990 from one Maria Belmira Lourdes Alda de Rocha and others.

4. The defendant No.1 as plaintiff filed Special Civil Suit No. 2/88/A for recovery of a loan given to defendant No.2 in the sum of Rs.85,075.20 and the said Suit came to be decreed by Judgment dated 13.11.1990 of the learned Civil Judge Senior Division, Mapusa in the said sum of Rs.85,075.20 with interest at the rate of 10% per annum.

5. The defendant No.1 applied for execution of the said Decree in the said Special Civil Suit No.2/88/A and in the said execution sought for attachment of the share of the said defendant No.2 in the said property "Gharbhat" and the learned Civil Judge Senior Division, by his Order dated 10.3.1991 ordered the said attachment.

6. In the meantime the defendant No.2 along with his wife the defendant no.3, just five days prior to

the said Judgment in Special Civil Suit No.2/88/A by Gift Deed dated 8.11.1990 gifted in favour of plaintiff No.9 Pramod, the brother-in-law of the said defendant No.2, his 1/5th share in the said property "Gharbhat", and, as recited in the said Deed of Gift the said Gift was made by the said defendant No.2 as donor in favour of the said plaintiff No.9, the donee, out of love and affection.

7. The case of the plaintiffs was that since the time of purchase the said property "Gharbhat", the plaintiffs, except plaintiffs No.9 and 10, were continuously residing in the said residential house situated in the said property and were the co-owners of the same in actual physical possession and enjoyment. The plaintiffs stated that the defendant No.2 was not keeping mentally well and raised unnecessary quarrels with plaintiffs No.1 to 8 and for that reason the defendant No.2 was not residing along with the plaintiffs No.1 to 8 even from the time of purchase of the said property. The plaintiffs further stated that the defendants No.2 and 3 by the said Gift Deed dated 8.11.1990 transferred their undivided 1/5th share to the said property in favour of the plaintiffs No.9 and 10 and therefore the Defendants No.2 and 3 did not have any share in the said property.

8. The plaintiffs stated that they came to know from reliable source about the execution proceedings bearing No.9/91/A filed the defendant No.1 against defendant No.2 and after having made inquiries, came to know that the defendant No.1 had filed Special Civil Suit No.2/88/A against defendant No.2 for the recovery of the decretal amount and the said Suit was decreed by Judgment and Decree dated 13.11.1990 which was sought to be executed wrongfully in seeking to sell the said property in public auction when the defendant No.2 did not have any right or title to the said property. The plaintiffs,therefore, filed the Suit for:- (a) Declaration that the Order of attachment of sale in auction of the said property in the said execution proceedings was null and void; and also (b) for permanent injunction to restrain the defendants from interfering in the suit property in any manner whatsoever.

9. The defendants No.2 and 3 did not contest the said suit, but the defendant no.1 contested the suit by stating that the defendants No.2 and 3 had executed the said Gift Deed with the intent to defeat and delay the recovery of money in the said S.C.S. No.2/88/A. Defendant No.1 further stated that the defendants No.2 and 3 still reside in the same house along with the defendants No.1 to 8. Defendant No.1

denied that defendant No.2 was not keeping mentally well. Defendant No.1 further stated that by the said Gift Deed dated 8.11.1990 the defendants No.2 and 3 had gifted their 1/5th share in the said property "Gharbhat" in favour of their said brother-in-law the defendant No.9, which Gift was null and void ab initio and was made with the intent to defraud the decree holder, namely defendant No.1. Defendant No.1 also filed a counter claim in the said Civil Suit No.156/91/A and prayed:- (a) for dismissal of the Suit with costs; (b) for decreeing the counter claim and (c) for declaring the Gift Deed dated 8.11.1990 as void and for a direction to the said Registrar not to register the said Deed and/or if registered for cancellation of the said registration.

10. After issues having been framed plaintiff No.5 examined himself. The plaintiffs also examined plaintiff No.9 and one Anand Naik. The defendant No.1 examined her son and attorney.

11. The only question before the learned Civil Judge Senior Division and now before this Court is whether the said Gift Deed dated 8.11.1990 made by Defendants No.2 and 3 in favour plaintiffs No.9 and 10 was made with the intent to defeat or delay the creditors of the defendants No.2 and 3 as

contemplated by Section 53 of the Transfer of Property Act, 1982. In other words, the controversy centres around the said Section 53 of the T.P. Act, 1982 which reads as follows:-

> " 53. Fraudulent transfer.- (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor (which term include a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.
>
> For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

12. The first submission which has been made by the learned Advocate Shri Usgaonkar is regarding the finding of the learned Civil Judge Senior Division that defendant No.1 was not a creditor of defendant No.2. In fact, the learned Civil Judge Senior Division has concluded that when the said Gift Deed was made by defendants No.2 and 3 in favour of plaintiffs No.9 and 10 there was no debtor or creditor since it was not possible to know whether the said S.C.S. No.2/88/A was to be decreed or not in favour of the defendant No.1.

13. Learned Advocate Shri Usgaonkar has submitted that the said relationship of debtor and creditor was very much existing between the defendant No.2 on one hand and defendant No.1 on the other hand, the moment the defendant No.1 had lent money to defendant No.2, and the subsequent decree might have only proved the said relationship. Learned Advocate Shri Usgaonkar in support of his submission has relied on the word "Creditor" as defined in Black’s Law Dictionary.

14. On the other hand, learned Advocate Shri Mulgaonkar has submitted that the conclusion of the learned Civil Judge Senior Division that at the time the Gift was made, there was no relationship of debtor and creditor between defendant No.2 and

defendant no.1 is correct.

15. I am inclined to accept the submission of the learned Advocate Shri Usgaonkar that there was a relationship of creditor and debtor between the defendant No.1 on one hand and the defendant no.2 on the other hand when the said Gift Deed was made. A creditor has been defined in the said Black's Law Dictionary as a person to whom a debt is owing by another person who is the "debtor". One to whom money is due, and, in ordinary acceptation, has reference to financial or business transactions. The term "creditor", within the common-law and statutes that conveyances with intent to defraud creditors shall be void, includes every one having right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort, and includes not merely the holder of a fixed and certain present debt, but every one having a right to require the performance of any legal obligation, contract or guarantee, or a legal right to damages growing out of contract or tort, and includes one entitled to damages for breach of contract to convey real estate, notwithstanding the abandonment of his action for specific performance.

16. Section 53 of the T.P.Act, 1882, though does not define as to who are the creditors, in ordinary parlance the term "creditor" is always understood as co-relative to a debtor and signifies a person to whom money is due and payable and it includes both secure as well as unsecured creditors and not only that, it also includs not only those who have proved their claim and have obtained a decree but also those who are yet to obtain a decree in their favour. The decree, if obtained subsequently, in the said S.C.S. No.2/88/A would have only confirmed the position of the defendant No.1 as creditor in relation to defendant No.2 as a debtor. The conclusion of the learned Civil Judge Senior Division that there was no relationship between the defendant No.1 as creditor and defendant No.2 as debtor is incorrect.

17. Learned Advocate Shri Mulgaonkar on behalf of the plaintiffs/respondents has submitted that there were no allegations that the said Gift Deed was fraudulent inasmuch as the defendant No.1 had also not proved the same to be fraudulent. Learned Advocate Shri Mulgaonkar has further submitted that only suspicion that the said Gift Deed was executed to defeat the rights of the defendant No.1 was insufficient to decree the counter claim of the defendant No.1 and in support of the said submission

learned Advocate Shri Mulgaonkar has placed reliance on the cases of **Seth Maniklal Mansukhbai v. Raja Bijoy Singh Dudhoria and others** (A.I.R. 1921 Privy Council, 69), **Mt. Phoosi v. Radhey Shyam and Others** (A.I.R. (37) 1950 Ajmer, 41) and **Chumar v. Alima and others** (A.I.R. 1998 Kerala, 139). In the case of **Seth Maniklal** (Supra) it was observed that the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. In the case of **Mt. Phoosi** (Supra) it was observed that the mere fact that a transfer was executed without consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with intention to defeat or delay the creditors of the transferor and that each case should be examined on its own merits. In the case of **Chumer v. Alima and others** (supra) it was observed that if the contention was that the transaction was a sham and nominal transaction of the property was only sought to be conveyed and had remained with the person concerned, Section 53 might not have any application.

18. On the other hand, learned Advocate Shri Usgaonkar has submitted that the pleadings in para 6 of the written statement were more than sufficient and that no further particulars were required to be

given by way of any clarification of the fraudulent intention to gift away the said property on the part of defendant No.2. Learned Advocate Shri Usgaonkar has further submitted that the date when the transaction took place in relation to the documents available on record, was more than sufficient to conclude that the said Gift Deed was executed with the intention to defraud defendant No.1. Learned Advocate Shri Usgaonkar has placed reliance on the cases of **Mamraj Agarwala and others v. Ahamad Ali Mahamad** (A.I.R. 1919 Calcutta, 984[2]), **Jangali Tewari (since deceased) v. Babban Tewari and another** (A.I.R. 1982 Allahabad, 316) and **Ouseph Skaria of Naduvilaparambil and others v. Cherian Joseph of Pooppallil and other**s (A.I.R. 1965 Kerala, 288).

19. In the case of **Mamraj Agarwala and others** (supra) it was observed that it was not apparent whether the decree was obtained before the 'kobala' or after; but, at any rate, the suit had been instituted, and the plaintiff's father was well aware of the probability of a decree for a substantial sum being passed against him and this fact ought to have been considered by both the Courts below, carefully and the case was therefore remanded to consider the presumption which was created by clause (2) of that Section.

20. In the case of **Jangali Tewari** (supra) it was observed that the two Courts below had found the transfer to be sham and fictitious and was only a make-believe and in fact no transfer had taken place and the property had remained where it was and if that was so, it was not necessary to invoke Section 53 of T.P. Act at all for holding that the property was liable for attachment and sale in execution of the decree and notwithstanding the apparent transfer, the property in fact continued to belong and remain in possession of the second defendant.

21. In the case of **Ouseph Skaria and others** (supra) it was observed that:

> " There must have been an actual conveyance in order that the expression "transfer of immovable property" in S.53 of the T.P. Act can apply. The word "transfer" in the section does not cover what passes for a transfer. A feigned or sham transfer is not a "transfer". But if a creditor who is defeated or delayed thereby, has a right to sue to avoid a transfer which is real though fraudulent, a creditor defeated or delayed by a transfer which is sham and nominal should all the more have the right to sue in order to establish that the transfer should not stand in the way of his recovering his debt from the property in question. Though

> such a creditor can ignore the sham transfer as a mere nullity, he can sue to establish his right to do so; in other words, his right to treat the transfer as void thus avoiding the transfer. If section 53 were not really intended to apply to a sham transfer, it could only have been because a right of suit is given by S.42 of the Specific Relief Act. The policy of the law as disclosed both by S.53 of the Transfer of Property Act and by R.63 of O.21 of the Code being that a defeated creditor should be enabled to proceed against the property of his debtor which has been transferred, whether really or only nominally, in order to defeat him, the application of S.42 of the Specific Relief Act cannot be excluded if its words apply or the discretion vested in the Court by that section can be exercised in favour of a creditor who has been defeated by a sham transfer. A suit by the creditor for a declaration that the transfer is sham and that he is entitled to proceed against the property for the realisation of his debt, would lie under S.42 of the Specific Relief Act. And, if the conditions required for a suit under O.21, R.63 Civil P.C. or under S.53 of the Transfer of Property Act are satisfied, the Court cannot decline to exercise its jurisdiction in his favour (emphasis supplied)."

22. There is no doubt that the finding as to the fraudulent nature of a transaction cannot be based on suspicion and conjectures but at the same time, it must be said that fraud is seldom, if ever, susceptible of being demonstrated by direct evidence. It has therefore to be inferred only from the

circumstances proved in a given case. Admittedly in the case at hand, the Gift Deed was executed by defendants no.2 and 3 in favour of their own brother-in-law and sister-in-law namely defendants No.9 and 10 just five days before the decree for the recovery of the loan amount could have been passed in the said S.C.S. No.2/88/A and that too of a house property jointly belonging to five brothers, including Defendant No.2 and therefore an irresistible inference ought to have been drawn that the Gift Deed was made only for the purpose of defeating the decree which defendant No.1 was likely to obtain in the said Civil Suit. The said inference could have been displaced by Defendant Nos.2 and 3 by explaining the circumstances under which the gift was made and by proving that the said Gift was made in good faith. Admittedly, defendants No.2 and 3 had not even contested the suit filed by the plaintiffs nor had stepped in the witness box and, on the contrary, the plaintiffs had taken inconsistent pleas from time to time. For example, although the Gift Deed itself stipulated that the said gift was made out of love and affection, plaintiff No.5 (P.W.1) went to the extent of pleading that defendant no.2 was not keeping mentally well and further stated in his evidence before the Court that defendant No.2 was not in his senses. The plaintiff No.9 (P.W.2) went

to the extent of stating that the said Gift was made because defendant no.2 had taken from him a sum of Rs.10,000/- which was contrary to the case set out by the plaintiffs. If P.W.1 Pandurang stated that defendants No.2 and 3 are staying in the out-house existing in the same property, P.W.2 Pramod stated that defendant No.2 was residing in "pakadi" of the same house and P.W.3 Anand stated that defendants No.2 and 3 were residing separately at the back of the house, in a hut. The said facts stated by the said witnesses only tend to show that they are only trying to justify a transaction which was made with the intention of defeating the decree which defendant No.1 was about to obtain in the said Civil Suit against defendant No.2. At this stage it may be noted that Section 53 of the T.P. Act, 1882 contemplates a transaction of immovable property made with intent to defeat or delay the creditors of the transferor and the crux of the question invariably is - what was the intention? It is well said that intention cannot often be proved by direct evidence and in the words of Brian, G.J., " It is trite learning that the thought of man is not triable for the Devil himself knows not the thought of man" In my opinion, since the defendants No.2 and 3 had made the said gift in favour of their own close relations and that too of a house property just five days prior to

the decree in the suit filed against the defendant No.2 by the said defendant No.1, and that too without any further explanation the conclusion that it was made in order to defeat the rights of the defendant No.1 under the said Decree was inescapable. The learned Civil Judge S.D. therefore ought to have concluded that the said Gift Deed made by the defendants No.2 and 3 in favour of plaintiffs No.9 and 10 was made with the intent to defeat the decree which defendant No.1 was likely to obtain in the said Civil Suit.

23. The next submission made by the learned Advocate Shri Mulgaonkar is that the suit of the defendant no.1 ought to have been filed in a representative capacity as stated in section 53 of the T.P. Act 1882. As already seen Section 53 of the T.P. Act 1882 does in fact provide that " a suit instituted by a creditor (which term includes a decree holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with the intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors". There is now preponderance of judicial opinion that a single creditor can file a suit. In the case **of Tharu Cheru v. Mary (A.I.R.**

1973 Kerala, 125) it has been held that if there is a single creditor he can file a suit under section 53 of T.P. Act to set aside a fraudulent transfer and that there need not be more than one creditor in existence for the purpose of availing of the provisions of Sec. 53 of the T.P. Act.

24. I have no reason to differ from the said view held in the case reported in A.I.R. 1973 Kerala,, 125. Moreover, the phrase "creditors" in sub-section (1) of S.53 of T.P.Act, 1882 could also be interpreted so as to include a single creditor and therefore a single creditor could also file a suit under S.53 of T.P.Act to set aside a fraudulent transfer.

25. In the light of the above discussion, in my opinion, the learned Civil Judge Senior Division ought to have allowed the counter claim filed by the defendant No.1 declaring the Gift Deed dated 8.11.1990 as null and void and with further consequential relief prayed for by defendant No.1. The learned Civil Judge Senior Division consequently ought to have dismissed the suit filed by the plaintiffs. Hence I make the following Order:-

26. The appeal is hereby allowed and the Judgment

and Decree of the learned Civil Judge, Senior Division in Special Civil Suit No.156/1991/A is hereby quashed and set aside and as result the suit filed by the plaintiffs shall stand dismissed. Consequently the counter claim filed by the defendant No.1 shall stand decreed with costs in terms of prayer clause (b) of para 21 of the said counter claim and the registration of the said Gift Deed is hereby ordered to be cancelled by the Sub-Registrar of Bardez. Defendant No.1 shall be entitled to costs of this appeal as well.

N.A. BRITTO, J.

sl.